

LEGAL PROTECTION FOR CREDITORS IN FIDUSIA AGREEMENTS IN INDONESIA

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Abstract—The development of business unit needs will increase the business capital cause fiduciary plays an important role in the provision of credit banks or financing institutions. The Fiduciary Guarantee Institution with the legal foundation of Law No.42 of 1999, is present to meet the legal needs that can further spur national development and to ensure legal certainty and legal protection for creditors under fiduciary guarantee agreements. Laws play their part to provide protection for parties in fiduciary agreements, especially to creditors who have invested in fiduciary agreements. Those who are not willing to or do not register their fiduciary will cause the creditors severe losses.

Keywords—*Fiduciary; Creditors; Indonesia*

I. INTRODUCTION

A fiduciary security institution is one of the security institutions in Indonesia. Arguments related to fiduciary security and its provision in Indonesia. Laws regulating fiduciary does not develop as a development of fiduciary security in the practice of economy in Indonesia. Fiduciary law should be viewed and understood as one legal category. The importance of fiduciary security practices should be attached to the fiduciary agreement of the fiduciary providers and recipients. A good law should be able to reduce the chances of conflict between the parties, or even stop the conflicts from occurring.

Laws play their role as conservation facility for citizen's needs in community, in this case the needs of fiduciary security practitioners. The objective of the fiduciary providers and the recipients. Laws also authorize and regulate way for settling legal problems and preserving legal certainty. Serving as a dynamic entity, law does not belong to a certain position, it keeps accommodating with certain social conditions and situations. The development of fiduciary security in Indonesia forces law which regulate fiduciary security to change.

Legal guarantee has a function to cover the debt, therefore the guarantee is a protection for the creditors that is the certainty of debt repayment debt or the implementation of an achievement by the debtor or the debtor's appointment. This kind of protection usually occurs in credit practices conducted by banking institutions. Use and utilization of funds available in these banking institutions need to be protected because these funds are publicly owned funds. If funds from banking institutions channeled to the community in the form of credit cannot be returned, it will cause disruption or stagnation in the development that will lead to public unrest. To protect and secure public funds administered by banks disbursed in the form of credit, should be carried out with safeguards using the principles of prudence. Therefore, it is necessary to protect the creditor in securing the assets or capital lent to the debtor.

Giving credit or loan capital from the creditor to the debtor must be done by the creditor carefully. This is because of the fiduciary agreement will arise a considerable amount of risk, whether the funds and interest from loans lent can be accepted again or not.

At the heart of fiduciary relationships is entrustment of property or power that clients hand over to their fiduciaries in order to enable fiduciaries to perform a service to them. These clients are the entrustors. Fiduciary law reflects and deflects the risks that this entrustment poses for entrustors[1].

II. THE PROTECTION FOR CREDITORS IN FIDUCIARY

According to J. Satrio that in the beginning of Private Law Book, pawn assurance institution and mortgage were indeed sufficient for assurance practice. At the time, credit activity has not developed and pawned properties were artwork and jewelry. At this moment, one of the form of material assurance used is fiduciary assurance which is for moving object assurance contract[2].

Act no. 42 of 1999 on Fiduciary Guarantees is intended to accommodate the needs of the public regarding the regulation of Fiduciary Security as one means to assist business activities and to provide legal certainty to the interested parties. Fiduciary Guarantee makes it easy for the parties who use it, especially for the Fiduciary Giver. On the contrary, because Fiduciary Guarantee is not registered, it does not guarantee the interest of the fiduciary party, the Fiduciary Giver may pledge the fiduciary object to the other without the knowledge of the Fiduciary Receiver.

The right transfer of debt with fiduciary assurance can be transferred by the fiduciary receiver to new fiduciary (new creditor). New creditor is the one who do the registration regarding the transfer of fiduciary assurance to Fiduciary Assurance office[3].

This act regulates the registration of Fiduciary Guarantee in order to provide legal certainty to the parties concerned and the registration of Fiduciary Guaranty gives priority to the Fiduciary Receiver to another creditor because Fiduciary Guaranty gives the Fiduciary Giver the right to keep possession of the be the object of Fiduciary Guarantee based on trust, it is expected that the registration system regulated in this act may provide assurance to the fiduciary receiver and those parties who have an interest in that object.

Increasing use of securities and collaterals in transactions also brings the legal ambiguity in today's financial markets which are trying to globalise. It should have been noted that without legal certainty an achievement can not be obtained in a complete manner[4].

Based on existing principles to provide legal certainty, UUJF takes the principle of fiduciary guarantee registration. The registration is expected to provide legal certainty to the fiduciary giver and receiver as well as to a third party. Some of the principles adopted in the UUJF are: (1) the principle of legal certainty; (2) the principle of publicity; (3) a balanced protection principle; (4) the principle of accommodating practical needs; (5) authentic written principles; (6) the principle of providing a strong position to the creditors.

Fiduciary security must be registered, as set forth in article 11 UUJF. With the enrollment, UUJF fulfills the principle of publicity which is one of the main principles of material security law. The provision is made with the object that the object, which is the object, is really a possession of the debtor or fiduciary so that if any other party wishes to claim the object, he may know it through the announcement. The registration of fiduciary guarantee shall be done at the Fiduciary Registration Office in the duties of the Department of Justice and Human Rights of the Republic of Indonesia, where for the first time, the office shall be established with a working area covering all the territory of the Republic of Indonesia.

The purpose of registration in fiduciary relates to the principle of publicity that a third party has the opportunity to know about the registration of objects, the characteristics of registered objects and of certain objects bound as collateral for the benefit of certain creditor, for a certain amount, with certain promises. Registration is intended to have an impact on third parties. By registration, the third party is deemed to know the inherent features of the object and the existence of a bond of assurance with the characteristics mentioned therein, and in the event that the third party fails to observe / control the register / register, he cannot expect protection in good faith and should bear the risk of loss.

One way to protect the interest of the Creditor (as Fiduciary) is to provide a definite provision for the Creditor. The complete set of data that must be contained in the Fiduciary guarantee (Article 6 UUJF) indirectly provides a strong grip for the Creditor as the Fiduciary Receiver, in particular which bills are guaranteed and the amount of the guarantee value, which determines how much the creditor's bills are.

The transfer of ownership is defined as the transfer of ownership of the fiduciary trust, provided that the material objects that remain the object remains in the hands of fiduciary giver. Thus, debtors handed the possession of the objects to creditors. However, this possession of the objects can be in the hand of the debtors, so that debtors can still use it. Creditors will act as the owner, if the debtor does not fulfill its obligations. In this case the creditor can demand the objects of debtor being bankrupt, the right is still in the hand of the debtor. This is called as fiducier.

The protection of the law and the interests of creditors in UUJF can be seen in Article 20 UUJF: Fiduciary still follows the object which becomes the object of Fiduciary Guaranty in the hands of whomever the object is located, except the transfer of the object, except the transfer of the inventory item into the object of Fiduciary Guarantee. The provision affirms that fiduciary assurance has material properties and applies to it the principle of *droit de suite*, except the transfer of the inventory item to the object of fiduciary collateral.

The same protection can also be seen in Article 23 paragraph (2): Fiduciary givers are prohibited from transferring, pledging or leasing to other parties' objects that are subject to Fiduciary collateral which are not inventory items, except with prior written approval and Fiduciary Receivers. "Sanctions to the above provisions shall be the criminal sanction as referred to in Article 36 UUJF: "Every person intentionally falsifies, alters, omits or in any way misrepresents, which if it is known by one of the parties does not give rise to a fiduciary guarantee agreement, imprisonment of at least 1 (one) year and a maximum of 5 (five) years and a fine of at least Rp.10,000,000.- (one million rupiah) and a maximum of Rp 100,000,000.- (one hundred million rupiah)".

For all acts and omissions of fiduciary givers, fiduciary beneficiaries shall be based on the negligence of such negligence, as referred to in Article 24 of the UUJF: "Fiduciary Recipients shall not be liable for the consequences of the act or omission of the Fiduciary Giver either arising out of contractual relations or arising from infringing acts law in respect of the use and transfer of any Items to the object of Fiduciary Guarantee".

The purpose of the fiduciary guarantee agreement in terms of legal protection for creditors is to grant privileges or rights precedence for him to repay his debts, debtors to him (*schuld* and *haftung* principles). Furthermore, the legal protection of the rights to receivables that precedes can be seen in the provisions of Article 27 UUJF: (1) Fiduciary Recipients have a priority right to other creditors. (2) The priority right as referred to in paragraph (1) shall be the right of the Fiduciary Receiver to take his receipt of receipt of the proceeds of the execution of the Object which is the object of the Fiduciary Guarantee. (3) The precedence and the Fiduciary Receiver are not erased due to bankruptcy and / or liquidation of the Fiduciary Giver.

Overall, then, some things that can indicate the existence of legal protection against creditors (Fiduciary Receivers) according to Law no. 42 of 1999 are as follows: (1) The existence of a fiduciary guarantee registration institution, which is nothing but to guarantee the interests of those receiving fiduciary; (2) The existence of a fiduciary prohibition to re-refine the fiduciary security object (article 17); (3) The provision that the Fiduciary Giver is not allowed to transfer, pledge or rent (Article 23 Sub 2); (4) The provision of fiduciary providers is obliged to surrender the guarantee goods, if the creditor wishes to execute the fiduciary security object; (5) The existence of criminal provisions in the Fiduciary Guaranty Act.

III. THE PROCESS OF WARRANTY OF FIDUCIARY: ONLINE FIDUCIARY

Directr General of General Law Administration of the Ministry of Justice and Human Rights applies 'online' fiduciary in providing services to the community with the

explanation that doing 'online' fiduciary is a new way of legal services faster and accurate.

The provisions on 'online' fiduciary registration are contained in Regulation of the Minister of Finance No. 130/Pmk. 010/2012 Regarding Registration of Fiduciary Collateral for Financing Companies Conducting Consumer Financing for Motor Vehicles with Fiduciary Guaranty Fee. Article 1 of Regulation of the Minister of Finance No. 130/ Pmk. 010/ 2012 stipulates that a Financing company conducting consumer financing for a motor vehicle with a fiduciary charge shall register such fiduciary assurance at the Fiduciary Registration Office. The registration shall be made no later than 30 (thirty) days after the date of the consumer financing agreement.

On March 5, 2013, the Ministry of Justice and Human Rights issued a Regulation on online fiduciary. Regulation of the Minister of Justice and Human Rights No. 10 of 2013 on Electronic Fiduciary Registration Procedures. The objectives of the issuance of this regulation are as follows: (1) To improve the legal services of fiduciary guarantee registration easily, fast, cheap and convenient, electronic registration of fiduciary guarantee shall be applied; (2) The regulation on registration of fiduciary guarantee in the Decree of the Minister of Justice and Human Rights No. M.01.UM.01.06 of 2000 on Form Forms and Procedures for Registration of Fiduciary Guarantee is not in accordance with the legal requirements of the community, so it needs to be replaced.

The registration of fiduciary security under Regulation of the Minister of Justice and Human Rights No.10 Year 2013 includes: (1) Application for Fiduciary Guarantee; (2) Registration of change of Fiduciary Guarantee; (3) Removal of Fiduciary Guarantee. Fiduciary Guarantee application registration electronically is done by filling out the application form. Completion of the application form includes: (a) The identity of the Applicant; (b) The identity of the fiduciary giver; (c) Identity of fiduciary recipient; (d) Fiduciary Collateral Deed; (e) Principal agreement; (f) The value of the guarantee; and (g) The value of the object to which the Fiduciary Guarantee is subjected.

The applicant prints the registration proof after completing the application form. The registration evidence contains: (a) the registration number; (b) Application filling date; (c) Name of the Applicant; (d) Name of Fiduciary Registration Office; (e) Types of applications; and (f) Fees for registration of the Fiduciary Guarantee application in accordance with the provisions of the laws and regulations.

Based on the evidence of registration, the Applicant shall pay the registration fee of the Fiduciary Guarantee application through the Perception Bank. Upon payment, the Applicant prints a Fiduciary Guarantee certificate that has been electronically signed by the Fiduciary Guarantee Registration Officer.

Changes can be made and there is a separate mechanism if you want to make changes from the fiduciary guarantee certificate. Registration of the Fiduciary Guarantee change electronically is done by filling the application form of the change. In order to fill the application form of registration of change of Fiduciary Guarantee, Applicant fill in: (1) number, date, month and year of last Fiduciary Guarantee certificate; and (2) the name and position of the notary prior to the amendment.

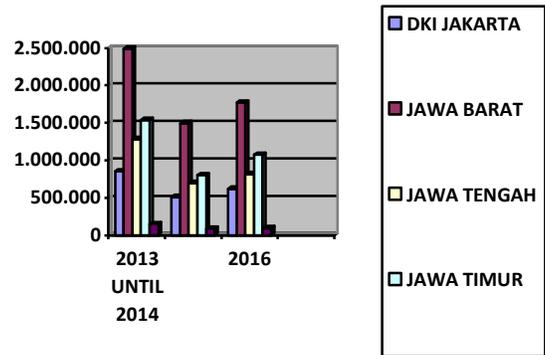
The applicant shall fill out the application for registration of the change of Fiduciary Guaranty in accordance with what is stated in the deed of Fiduciary Guarantee change. The applicant prints the registration evidence of the change of Fiduciary Guarantee after completion of filling the application form of the change. Based on the evidence of registration, the Applicant shall pay the registration fee for the change of Fiduciary Guaranty through Perception Bank. After making the payment, the Applicant prints a Fiduciary Security change certificate which has been electronically signed by the Official.

Fiduciary Guarantees are waived for: (1) Removal of debt secured by Fiduciary; (2) Waiver of the Fiduciary Guaranty by fiduciary recipients; or (3) The loss of the object to which the Fiduciary Guarantee is supposed to be. In the event of deletion, the Applicant shall apply for the written-off of the Fiduciary Guarantee certificate in writing to the Minister. Application for the abolition of Fiduciary Guarantee, by enclosing: (a) A certificate of release from a fiduciary or certificate of disposition of a right or certificate of expiration of the Fiduciary Guaranty object; (b) Fiduciary Guarantee Certificate; and (c) Evidence of payment of Fiduciary Guaranteed Removal certificate fee in accordance with the provisions of statutory regulations.

In the event that the Applicant has paid the abolition fee of the Fiduciary Guarantee certificate, the Fiduciary Registration Office shall issue a certificate stating that the Fiduciary Guarantee certificate is no longer valid.

The system has some advantages and disadvantaged. The advantages of this system are the quick transaction time, adding PNPB to the state, and preventing illegal toll in the imposition of fiduciary guarantee. However, as a new system, the online registration causes some difficulties for its users, including the notaries. The notaries should be really careful in performing the system since all responsibilities are in their hands. Control to the notaries is also low since the government put a very high level of trust to the notaries so that the possibility of the notaries to perform illegal action may happen. Notaries' responsibilities bring certain burden since criminal as well as civil pursuits can be the consequences that the notaries should face in doing online fiduciary registration[5].

Since the application of online fiduciary in Indonesia, a fiduciary registration has become obligatory. We can see below the data of online fiduciary registration in Indonesia.



The above data show that there has been an increase in the fiduciary registrations in Indonesia since the application of online fiduciary. There were 10,397,795 fiduciary registrations from 2013 to 2014, 6,305,187 in 2015, and 7,577,968 in 2016.

IV. UREGISTERED FIDUCIARY GUARANTEE

The financial grant of the financial institution is basically similar to the grant of credit by bank, assurance is necessary to assure that the debtor is able to fulfill his obligation according to the financial contract signed by the parties. Beside trust assurance, in financial contract, material assurance contract is also done in moving object in fiduciary contract[6]. Fiduciary law regulates relationships that are based on reasonable trust. In fact, “[t]he term 'fiduciary' itself was adopted to apply to situations falling short of 'trusts,' but in which one person was nonetheless obliged to act like a trustee.”[7]

There are financial institutions or monetary institutions either banks or non-banks which do not register their fiduciary guarantees due to their respective policies toward fiduciary guarantee registration.

There are several factors that influence the number of unregistered fiduciary guarantee, among others: (1) the fiduciary registration and the nullification of fiduciary guarantee fees are imposed on the debtor or they are deducted from the total amount given to the debtor; (2) the amount of debt given to the debtor is considered to be too small so it is considered to be irrelevant; (3) the debt amount is too small and the fiduciary guarantee registration becomes an unworthy thing to do since the financial or monetary institutions either banks or non-banks have their own policies on how much is the minimum debt to be registered using a fiduciary guarantee; (4) the low legal education of either the creditor or the debtor especially on the fiduciary guarantee. This condition is due to the ineffectiveness of socialization about the fiduciary guarantee. There are still people who do not understand the importance of the fiduciary guarantee registration, the rights they will get when registering their fiduciary guarantee, and

the provisions on the executions that can be performed by the creditor if the debtor is default; (5) the ineffective socialization of online fiduciary registration. The socialization of online fiduciary registration has not touched everyone in general and especially small-scale financial institutions either banks or non-banks which provide fiduciary guarantee; (6) there are notaries who do not accept fiduciary guarantee registrations. This condition is because they feel that the amount of money that they will receive for the registration is too small compared to the legal responsibility they bear. Besides, there are still creditors or debtors who do not have good will. This condition becomes a precaution for the notaries and they receive only data related to the object(s) that will be used as the guarantee. Therefore, for this caution, they only perform registrations for certain credible creditors; (7) there are notaries who only issue fiduciary imposition deeds but do not perform any registration; (8) some notaries only issue fiduciary imposition deeds and do not perform any registrations considering the payment of the employees and other operational fees and the like.

The registered fiduciary guarantee has its own advantages for respective parties. The advantages are among other: both the fiduciary giver and receiver as the parties involved are given equal legal protections, the fiduciary receiver provides a preference right over his or her credit and the right of continuation is applied over the guarantee object while the fiduciary giver still has the right of use over the guarantee object(s) and there will be no transfer of ownership in the case of the debtor's default. On the other hand, when the fiduciary guarantee object is not registered, both the fiduciary giver and receiver will face problems when either side breaches the contract especially during the process of the guarantee object execution.

Increasing use of securities and collaterals in transactions also brings the legal ambiguity in today's financial markets which are trying to globalise. It should have been noted that without legal certainty an achievement can not be obtained in a complete manner[8].

The point is that when a fiduciary is unregistered, there are no preference right and no executorial power. This can be disadvantageous for the creditor because he or she loses his or her preference right or executorial power when the debtor is default.

For fiduciary objects that have been clearly stated as collateral debt, creditors should monitor the object so as to avoid the cheating (fraud) by debtors. Finally, creditors who maintain and take assets as collateral should be in accordance with applicable law[9].

There are some obstacles in the process of execution of the unregistered fiduciary guarantee object, which are: (1) the changes of the debtor's locations and (2) the object being used as the guarantee is mortgaged to another creditor. Those conditions will obstruct the creditor when performing an

execution. The obstruction is because the loan agreement in which the fiduciary guarantee is not registered does not give a privilege for one creditor to execute the object instead of the other.

V. CONCLUSIONS

Legal protection for creditors in fiduciary guarantee agreements shall take the form of juridical constructions contained in Law no. 42 of 1999 on Fiduciary Guarantee. Fiduciary must be registered so that the creditor gets a strong legal protection because if the debtor is defaulted then it can execute immediately. With the loading of the fiduciary guarantee, the publicity principle is fulfilled and at the same time a guarantee of certainty to other creditors concerning objects which have been encumbered by fiduciary guarantee. The registration of the fiduciary guarantee, in addition to providing legal certainty to the interested parties, also grants preference to fiduciary recipients against other creditors.

There are several advantages when a fiduciary is registered, among others, both the debtor and creditor, as the parties of interest, obtain a legal protection, a creditor will get a preference privilege for his or her credits, right of continuation principle will be applied to the guarantee object, the creditor has a direct executorial title when the debtor is default, and the debtor is entitled with the right of use over the guarantee object(s).

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